

September 16th, 2003

Water Docket
Environmental Protection Agency,
Mail Code 4101T, 1200 Pennsylvania Avenue, NW.
Washington, DC 20460,

Attention Docket ID No. OW-2003-0063.

The Sacramento-Yolo Mosquito and Vector Control District (SYMVCD) is submitting these comments in response to the “Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA” from G. Tracy Mehan, III (signed and dated, July 11, 2003) Assistant Administrator for Water (4101) and Stephen L. Johnson (signed and dated, July 11, 2003) Assistant Administrator for Prevention, Pesticides and Toxic Substances.

The SYMVCD supports the Interim Statement and Guidance document, and urges USEPA to issue a rule by use of notice-and-comment procedures. Section 501(a) of the CWA, 33 USC 1361(a), grants broad authority to the Administrator “to prescribe such regulations as are necessary to carry out his [or her] functions under” the CWA. Such a rule would constitute EPA’s determination of the meaning of the CWA provisions bearing on the need or lack of need for an NPDES permit in order to apply FIFRA-registered pesticides in accordance with product labels, and would be in accordance with the Interim Statement and Guidance document.

The SYMVCD also suggests two regulatory changes. First, the definition of the term “pollutant” set forth at 40C.F.R. § 122.2 should be amended. That provision includes two subsections ((a) and (b)) that identify materials that do not fall into the definition of a pollutant. EPA should add a third subsection, (c), as follows:

(c) A pesticide product that is registered or otherwise approved under the Federal Insecticide, Fungicide and Rodenticide Act for the purpose of control of mosquito larvae or adults, other vectors (as defined by section 2(o) of that Act), or other outdoor aquatic pests and is used for such

purpose in substantial compliance with all provisions of its approved label and labeling that are relevant to protection of waters of the United States.

Second, the definition of the term “discharge of a pollutant” in 40 CFR 122.2 should be amended by adding the following sentence at the end of the definition:

“This term also does not include the application or use of a pesticide product that is registered or otherwise approved under the Federal Insecticide, Fungicide and Rodenticide Act for the purpose of control in the atmosphere of adult mosquitoes or other vectors (as defined by section 2(o) of that Act) and is used in substantial compliance with all provisions of its approved label and labeling that are relevant to protection of waters of the United States.”

These suggested changes are outlined to the Agency in the Rulemaking Petition submitted to the Agency January 16, 2003 by the American Mosquito Control Association.

The SYMVCD believes the nature of mosquito larvicides and adulticides are such that there is little reason to be concerned about their environmental impacts, if they are used in accordance with their approved labels. These products have been used for many years with extremely few problems, in no small part because of the extensive Agency review under FIFRA.

We urge EPA to conclude through a rulemaking that the application of a mosquito *larvicide* to waters of the United States at sites and for purposes authorized by their FIFRA registrations (or other clearance) does not constitute the discharge of a “pollutant.” This is because when the larvicide is added to water, it is being added for its intended, beneficial, government-authorized purpose, and thus does not fall within the scope of the CWA’s NPDES provision, which applies only to material that is refuse or waste either before it is discharged into water or as soon as it is discharged.

We also urge EPA to conclude through a rulemaking that use of a mosquito *adulticide* should not be regarded as the discharge of a “pollutant” into waters of the United States both because it similarly is applied for its intended, beneficial, government-authorized purpose, rather than being discarded as refuse or waste, and because it is not discharged into waters of the United States but rather is applied in a manner calculated to lead it to remain in the atmosphere and reach waters of the United States only in relatively small amounts, if at all, and only incidentally, not deliberately. Analogous uses of other kinds of pesticides should be treated in the same manner.

The issuance of a rulemaking becomes apparent when one considers the response from legal staff of the State of California’s State Water Resources Control Board (SWRCB). SWRCB staff concluded that the Interim Guidance appears to be in conflict with holdings of the Ninth Circuit Court of Appeals and the State Water Resources Control Board should not follow the Interim Guidance. Staff further suggested that weighing the decisions of a federal appeals court that

presides over states including California, whose decisions are entitled to “great weight,” as opposed to an interim guidance document by EPA that has not been formally promulgated, following the Ninth Circuit decisions is a safer route. It is apparent that a rulemaking needs to take place to ensure California is consistent and in compliance with federal law.

Thank you for the opportunity to comment on the Interim Statement and Guidance Document, and the SYMVCD looks forward to the Agency performing a rulemaking to further clarify their position.

Sincerely,

David Brown
Manager